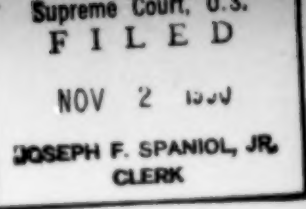


ORIGINAL



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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NO. 90-5887

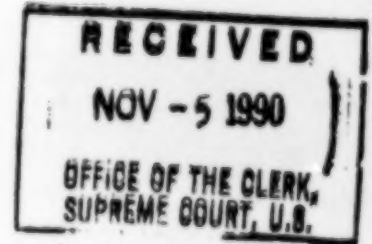
HOMER B. TEEL,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.



ON PETITION FOR THE WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

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The petitioner, Homer B. Teel, has filed a petition for writ of certiorari to the Supreme Court of Tennessee. The respondent, the State of Tennessee, respectfully submits this response to the petition.

OPINION BELOW

The Opinion of the Supreme Court of Tennessee is attached to the petition.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on May 29, 1990. On July 9, 1990, the Supreme Court of Tennessee denied the petition to rehear. On October 4, 1990, the petitioner filed his petition for writ of certiorari.

The petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257 and 28 U.S.C. §2101.

QUESTIONS PRESENTED

I. Whether the application of harmless error analysis to an error in the jury instructions presents a substantial constitutional question.

II. Whether this Court should consider an issue which was not properly raised in the Court below.

STATEMENT OF THE CASE

The petitioner, Homer B. Teel, was convicted by a jury of murder in the first degree and sentenced to death by electrocution. The Supreme Court of Tennessee affirmed the conviction and sentence on direct appeal. Petition, Appendix A-1. On June 28, 1990, the petitioner filed a petition to rehear. On July 9, 1990, the Supreme Court of Tennessee denied the petition to rehear.

SUMMARY OF THE ARGUMENT

I. At the guilt stage of the trial, the court failed to define the elements of rape in its felony-murder instructions. The petitioner does not assert that the deficient instructions violated his constitutional rights. He questions only whether harmless error analysis may be applied to an error raised and decided under state law. Harmless error analysis is a federal question only when the underlying error violates federal constitutional rights.

The proof established without question the elements of rape as well as first degree murder in common-law form, which was charged to the jury. The jury was instructed upon the elements of rape at the sentencing hearing and found beyond a reasonable doubt, without additional proof, that the murder occurred in the perpetration of a rape. The trial court's failure to define "rape" in the felony-murder instructions did not affect the verdict.

II. Evidence that the victim had hair in her hand was developed during the petitioner's cross-examination of the medical examiner. The trial court ordered analysis of the hair, but denied the motion for a new trial. The petitioner addressed this claim below only as a factor regarding sufficiency of the evidence. The record does not reflect whether the petitioner satisfied his obligation to provide hair samples for analysis.

ARGUMENT

I. THE APPLICATION OF HARMLESS ERROR ANALYSIS TO AN ERROR IN THE JURY INSTRUCTIONS FAILS TO PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The petitioner complains that the Supreme Court of Tennessee erred by applying harmless error analysis to the trial court's failure to define, in its felony-murder instructions, the elements of rape. Although the petitioner failed to object at trial, the Court examined the merits of the complaint. Petition, Appendix A-1, pp. 25-26. The Court then held that the failure to define the underlying felony of rape was error, but harmless beyond a reasonable doubt under the facts and circumstances of this case. Petition, Appendix A-1, pp. 26-28.

Initially, the respondent notes that the petitioner has failed to present the merits of this claim as an issue of federal constitutional law. His brief in the Supreme Court of Tennessee cited only the case of State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975). Appendix A. In addressing the merits of this claim, the Court found a constitutional right to a correct and complete charge of the law, relying exclusively upon state case law. Petition, Appendix A-1, p. 26. The cases cited by the Court in its opinion did not rely upon federal case authority or engage in federal constitutional analysis. Since neither the petitioner nor the Supreme Court of Tennessee addressed the

merits of this issue as a federal constitutional question, the petition for the writ of certiorari should be denied.

In this Court, the petitioner asserts no claim that the deficiencies in the jury instructions violated his federal constitutional rights. He merely asserts that error occurred because the state court found error. Since the petitioner has failed to present the merits of his claim as a federal constitutional issue, the petition should be denied.

The Supreme Court of Tennessee relied upon federal authority and held that the error was harmless. Petition, Appendix A-1, p. 27. Although the Court may have adopted the federal standard when it found that the state law error was harmless, the application of that standard is of no consequence in this Court unless the petitioner raises a federal constitutional claim as to the merits of the issue. The applicability of harmless error analysis is a federal question only when the alleged error is a violation of federal constitutional rights. Chapman v. California, 386 U.S. 18 (1967). The petitioner is asking this Court to consider whether an assignment of error which was raised and sustained under state law may be regarded as harmless. Since this fails to present a federal question, the petition should be denied.

The proof established that the petitioner's fourteen-year old victim was found dead with her jacket, bra

and blouse pulled up over her head. Petition, Appendix A-2, p. 5. After luring this child into a secluded area on a pretext, the petitioner forced her to perform fellatio. He stripped her of her pants and panties and forced sexual intercourse upon her. After forcing her to kneel and perform fellatio again, the petitioner pushed her to the ground, forced her head into a creek and drowned her. Petition, Appendix A-2, pp. 7-8. Without question, the proof established the elements of rape. The proof further established guilt of first degree murder in common-law form, which was correctly charged to the jury.

There is no question that the jury would have convicted the petitioner of either common law murder or felony murder. The jury was accurately instructed upon the elements of rape at the sentencing hearing. Without further proof, the jury found beyond a reasonable doubt that the murder was committed in the perpetration of rape. There is no reason to rule that the jury would have found otherwise at the first stage of the trial if the petitioner had requested and obtained an instruction defining "rape." Since the omission did not affect the outcome of the proceeding, the Supreme Court of Tennessee properly found that the error was harmless beyond a reasonable doubt. Petition, Appendix A-1, pp. 27-28.

II. THIS COURT SHOULD NOT CONSIDER AN ISSUE WHICH WAS NOT PROPERLY RAISED IN THE SUPREME COURT OF TENNESSEE.

In his second issue, the petitioner asserts that the Supreme Court of Tennessee failed to give "significance" to the trial court's order for the analysis of hair found in the victim's hand. This evidence was discovered at trial during cross-examination of the medical examiner by the petitioner. In his appellate brief, the petitioner argued this point only as a factor to consider in assessing the sufficiency of the evidence. Appendix B. The Supreme Court of Tennessee found that the evidence at trial was sufficient to support the conviction and sentence under the standard set forth in Jackson v. Virginia, 443 U.S. 370 (1979). Petition, Appendix A-2, p. 30. Since the petitioner's second issue was not presented to the courts of Tennessee as a separate issue or a federal constitutional claim, the petition for the writ of certiorari should be denied.

Contrary to the petitioner's assertion, this issue does not impair the finality of his conviction or sentence. Since the trial court ordered analysis at the same time he denied the motion for a new trial, he obviously intended only to grant the petitioner the means to explore any newly discovered evidence or to silence a potential issue. As explained below, the petitioner shaved his head rather than provide hair samples for analysis. If the petitioner is

genuinely interested in the merit of this issue, he should provide samples of his hair as ordered. If the analysis produces exculpatory evidence, this new evidence may be presented to the trial court by a writ of error coram nobis, Tenn. Code Ann. § 40-26-105, or by a petition for post-conviction relief, Tenn. Code Ann. § 40-30-101 et seq.

Under the facts and circumstances of this case, the petitioner has no basis to complain that the trial court's order has been ignored by the State. Petition, pp. 14-15. The trial court expressly conditioned his order upon the petitioner's voluntary consent "to the appropriate removal of hair follicles from his head and pubic area for comparison purposes." Petition, Appendix A-5, p. 2. There is nothing in the record which shows that the petitioner complied with his obligation to provide appropriate samples or that the State has precluded him from doing so.*

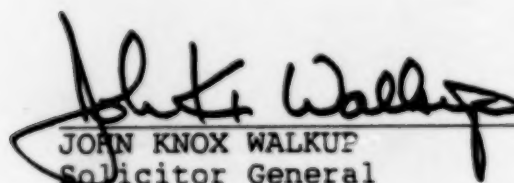
An issue which merits the attention of this Court merits fair presentation to the courts of Tennessee. Since the petitioner has failed to fairly present this issue to the state courts, the petition for the writ of certiorari should be denied.

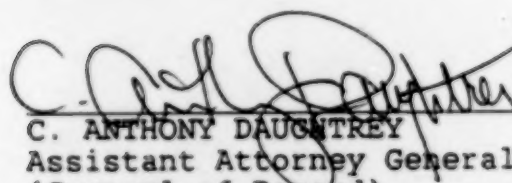
* It was disclosed at oral argument before the Supreme Court of Tennessee that the State had made arrangements to collect hair samples from the petitioner, who thwarted collection by shaving his head.

CONCLUSION

For these reasons, the State of Tennessee submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,


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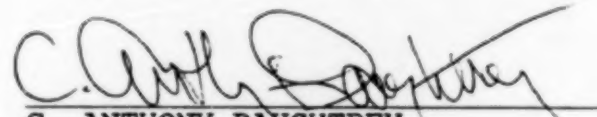
STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

AFFIDAVIT OF CERTIFICATE OF SERVICE


I, C. ANTHONY DAUGHTREY, being first duly sworn,
make oath that I was admitted to the Bar of this Court on
August 6, 1990.

I certify that on this 2nd day of November,
1990, I deposited twelve (12) copies of this Response to
Petition for Writ of Certiorari in a Unites States
mailbox, with first class postage prepaid, properly
addressed to the Clerk of this Court, and one (1) copy of
this Response to Petition for Writ of Certiorari in a
Unites States mailbox, with first class postage prepaid,
properly addressed to counsel for petitioner, Mr. Edwin Z.
Kelly, Jr., Attorney at Law, P. O. Box 869, 309 Betsy Pack
Drive, Jasper, Tennessee 37347, (615) 546-4646.

I further certify that all parties required to be
served have been served.


C. ANTHONY DAUGHTREY
Assistant Attorney General

Sworn to and subscribed before me
on this 2nd day of November, 1990.


NOTARY PUBLIC

My Commission expires: 5/20/92

INDEX TO APPENDIX

Appendix A - Page 90 of the petitioner's brief on appeal in
the Supreme Court of Tennessee.

Appendix B - Page 106 of the petitioner's brief on appeal
in the Supreme Court of Tennessee.

Even assuming arguendo that the felony murder charge would be appropriate in the subject case, Appellant points out that the Trial Court failed to define the crime of rape in the charge during the guilt-innocence phase. Appellant submits that such an omission is fatal. As a matter of fundamental fairness, if the felony murder charge was appropriate in this case, then the jury certainly should have been advised as to the definition of rape including all elements thereof. The duty of the Trial Judge in this regard as set out by this Honorable Supreme Court in the case of State v. Thompson, 519 S.W.2d 789 at p. 792 (Tenn. S.Ct. 1975) is as follows:

The general principle in criminal cases is that there is a duty upon the trial judge to give a complete charge of the law applicable to the facts of the case and the defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury upon proper instructions by the judge. (Citations omitted)

Even though not specifically brought out at the Motion for New Trial, Appellant points out to this Honorable Court that a portion of the malice instruction set forth aforesaid with the felony murder instruction creates a presumption of malice that has the effect of either eliminating intent as an issue, or of shifting the burden of

that the Defendant was engaged in committing rape, and this is evidenced by the finding of the jury during the sentencing phase (TE, Vol. 13, p. 1257, EX #19, p. 6).

There was no proof of motive, premeditation, deliberation, willfulness, maliciousness, or that the Defendant killed the alleged victim. From the proof presented by the State in this case, no rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt.

The action of the Trial Court in sustaining the Defendant's request for a comparison of hair samples found in the decedent's hand with hair of the Defendant (TR, pp. 71-72) is indicative of the existence of reasonable doubt. This further shows that the Trial Judge must have some reservations about the sufficiency of the evidence and the jury verdict. In accord with a previous decision by this Court in the case of Messer v. State, 385 S.W.2d 98 (Tenn. S.Ct. 1964), as perhaps modified by the case of State v. Cabbage, 571 S.W.2d 832 (Tenn. S.Ct. 1978), the jury verdict of first degree murder should be set aside.

As to the sentencing phase, the Defendant again relies upon the argument submitted relative to Issue XIV hereinbefore, and in addition thereto refers this Honorable Court to another first degree murder case out of Marion County, styled State v. Pritchett, 621 S.W.2d 127 (Tenn.